IN THE

Supreme Court of the United States

October Term, 1970

No. ~~1480~~ 70-98

RUDOLPH SANTOBELLO,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Preliminary Statement

This is a petition for a writ of certiorari to review an order of the Supreme Court of the State of New York, Appellate Division, First Department, entered December 1, 1970, unanimously affirming, without opinion [35 A.D. 2d 1084], a judgment of the Supreme Court of the State of New York, County of Bronx, convicting the petitioner, following a plea of guilty, of the crime of Possession of Gambling Records in the Second Degree [New York Penal Law, §225.15], and sentencing him to one-year's imprisonment in the New York City Correctional Institution for

Men (A48)*. Leave to appeal to the New York Court of Appeals was denied (Burke, J.) on February 4, 1971. Petitioner is free on bail pending determination of the instant petition, pursuant to an order of Mr. Justice Harlan of this Court signed on February 16, 1971.

Question Presented

Did the circumstances attendant upon the petitioner's entry of a guilty plea and upon the subsequent sentence proceeding deprived him of due process of law?

Statement of the Case

The petitioner Rudolph Santobello was indicted (3024/68) on November 13, 1968, for the crimes of Promoting Gambling in the First Degree [New York Penal Law, §225.10] and Possession of Gambling Records in the First Degree [*id.*, §225.20] on the affidavit of Patrolman Frank Serpico who averred that he had removed policy slips containing approximately 840 plays and other slips representing controller's records from the petitioner's person and automobile (A9-10).

The petitioner initially pleaded not guilty but he changed his plea to guilty of second degree possession of gambling records, a Class A Misdemeanor, on June 16, 1969 (A26). The assistant district attorney stated the facts as being that, on November 13, 1968, the petitioner knowingly possessed slips of mutuel race horse policy rep-

* Unless otherwise indicated, references are to pages of Defendant-Appellant's Appendix on appeal to the Supreme Court of the State of New York, Appellate Division, First Department.

resenting more than 500 plays, and recommended acceptance of the plea to cover the entire indictment (A27-8). Before taking the plea, Justice Marks ascertained that the petitioner had heard the plea offered by his attorney, that the petitioner knew what he was pleading to, and that the petitioner was entering the plea of his own free will (A28-9). When asked by the Court, the petitioner also admitted that the facts as stated by the assistant district attorney were true and correct (A29).

We pause momentarily to note that various motions were made in this case after the guilty plea had been entered and prior to the imposition of sentence. By motion returnable on June 17, 1969, supported by the affidavit of the petitioner herein sworn to April 19, 1969, the defense moved to suppress tangible evidence and oral statements obtained as a result of an allegedly unconstitutional search and seizure. On June 30, 1969, Justice Marks permitted the motion aforesaid to be withdrawn in open court.

Returnable on October 8, 1969, were two additional motions, supported by sworn affidavits of the petitioner Santobello. One was a motion to suppress any evidence secured by the prosecution as a consequence of an allegedly illegal search in violation of the petitioner's Fourth and Fifth Amendment rights, and in the petitioner's affidavit he asserted that no previous application had been made for the relief prayed for (A21-3). The second motion was one for inspection of the grand jury minutes and for an order dismissing the indictment. Our understanding is that both the motions aforesaid were "marked off" the calendar on Dec. 15, 1969. More specifically, the trial court's daily calendar indicates that the suppression motion was marked

off on that date in Justice Ross' Part. Furthermore, a pencil notation on the front of the notice of motions for inspection-dismissal indicates that these motions were similarly disposed of on that day.

Seemingly by motion also returnable on October 8th, the petitioner Santobello sought to withdraw his previously entered plea of guilty (A11-8). In his supporting affidavit, Santobello averred, *inter alia*, "* * * that before and at the time a plea of guilty was entered, deponent did not know that he had the right to move to suppress any evidence secured by the police as aforesaid" (A14). Additionally, the petitioner asserted that no previous application had been made for the relief being sought (A15). The prayer for relief sought not only permission to withdraw the plea, but also to make all necessary motions—apparently the suppression and inspection-dismissal motions returnable that day (*ibid.*).

In his affirmation in opposition to the motion under discussion, the assistant district attorney in charge of the case asserted that the movant had not set forth any reason warranting the relief prayed for, and he went on to request that, in the event that the Court were not disposed to deny the motion outright, a hearing be held to determine the factual issues (A24-25).

Our examination of the pertinent daily court calendar disclosed that the aforesaid motion to withdraw the plea was denied by Justice Marks on November 26, 1969, at which time he adjourned the sentencing until January 9, 1970.

On the adjourned date, the petitioner appeared before Justice Gellinoff for sentence (A30). At that time, counsel for Santobello remarked that, due to what he believed to have been an error, the second motion to suppress evidence and the motions for inspection-dismissal had been "marked off" the calendar, and he asked to have "number one" revitalized—seemingly the second suppression motion in view of the type legal argument advanced by the attorney in question (A31-8). Justice Gellinoff held that, by the taking of the plea, the motions were deemed to be abandoned, and that jurist added that they could be renewed by counsel in the proper manner, but he also indicated that no adjournment of the sentencing would be granted for that purpose (A37) [see *People* v. *Maldonado*, 27 N.Y.2d 667 (1970); *cf. Kaufman* v. *United States*, 394 U.S. 217 (1968)].

Before sentence was pronounced, defense counsel also made an unsuccessful argument to the effect that, in taking a plea, Justice Marks failed to interrogate Santobello fully about the significance of his act, citing the case of *McCarthy* v. *United States*, 394 U.S. 459 (1969) (A38-40). But, the incident aforesaid is not, as such, made a subject matter of this application.

Thereafter, the Executive Assistant District Attorney recommended a maximum sentence on the basis of the petitioner's criminal proclivities—including his 1951 conviction and life sentence for the murder of a police officer; his criminal activities after his release on parole; his alleged extensive links with organized crime; and his apparent wealth, the source of which was not apparent (A43-46). Counsel for the defense then stated the following:

> "Mr. Aronstein: Mr. Fruchtman, the lawyer who was present, and was this defendant's attorney, at the

time of the plea, told me, and told me that he will testify under oath, that at the time he took the plea, Mr. Greenfield, the Assistant District Attorney told him that the District Attorney will not make any recommendations, with respect to the sentence. And I therefore, ask that at this time this Court adjourn this sentence for a short period of time. I'll produce Mr. Fruchtman, and—in court, and have him testify in open court, as to what—

"Now if what Mr. Fruchtman says is true, then the plea was obtained by fraud and deception, by the District Attorney, if it was obtained on the expressed promise that the District Attorney would make no recommendation" (A45-46).

Justice Gellinoff replied that there was no need to adjourn the sentence or have any testimony because he would not be influenced by what the District Attorney said (A46). He then quoted from the petitioner's probation report as follows:

" 'He is unamenable to supervision in the community. He is a professional criminal * * * and a recidivist. Institutionalization * * * is the only means of halting his anti-social activities' " (A47).

The one-year maximum sentence was then imposed (A48).

Summary of Argument

The instant case involves state court decisions rendered upon a singular fact situation, and it does not present a substantial federal question for review by this tribunal.

ARGUMENT

To demonstrate the absence of a substantial federal question, we deem it worthwhile to quote the following relevant portion of respondent's brief in the state appellate courts:

> "Prefatorily, we wish to make a concession in connection with the instant discussion. After reading defendant's brief, the undersigned looked into the matter and we ascertained that Assistant District Attorney Greenfield had in fact stated to defense attorney Fruchtman before Santobello entered a guilty plea that the District Attorney's Office would remain silent at the sentencing of the defendant. The record, however, is silent as to whether or not that promise was communicated to Santobello. It is equally silent on the subject of whether Executive Assistant District Attorney Rotker was aware of Mr. Greenfield's representation—a question we will not now presume to answer because anything we say would be *dehors* the record. In that connection, it is noteworthy that Mr. Greenfield alone appeared for the prosecution at the time the plea was taken, and that Mr. Rotker alone appeared on behalf of the People at the time of sentence.
>
> We now turn to an analysis of the situation in the light of our concession. That is to say, our argument will pre-suppose that a promise not to comment at sentence had been made to Santobello and that it was ultimately broken by the prosecution.
>
> To begin with, we have some difficulty in categorizing the incident below. We note, for one thing, that there is a tendency to permit withdrawal of a guilty plea or to order a hearing where a defendant asserts his innocence prior to the actual imposition of sentence [see, *e.g.*, *People* v. *McKennion*, 27 N.Y. 2d 671 (1970)]. But the line of cases typified by that most recent ex-

pression of judicial attitudes by our State's highest tribunal is seemingly inapposite, for nowhere in this case was there a claim by Santobello either that he was innocent or that he did not comprehend the nature of his plea. While he does suggest (brief, p. 8) that he had a valid basis to suppress the tangible evidence seized from him on Fourth Amendment grounds, the entry of the plea of guilty appears to render that possibility innocuous for present purposes [*People* v. *Maldonado*, 27 N.Y. 2d 667 (1970); *cf. Kaufman* v. *United States*, 394 U.S. 217 (1968)].

Actually, the type grievance being urged upon this tribunal generally sounds in *coram nobis* law. Had this case also involved an element of coercion in inducing the plea, we would be constrained further to concede that the entire judgment should be vacated, but the critical element aforesaid is not present herein [*People* v. *Farina*, 2 N.Y. 2d 454 (1957)]. As a matter of fact, a disinclination to follow *Farina* is to be detected from subsequent opinions wherein the device employed has been to resentence the defendant—or to modify the sentence in the case of an appellate court—where there has been a broken promise by a prosecutor [see *People* v. *Hernandez*, 29 A.D. 2d 865 (2d Dept. 1968); *People* v. *Brooks*, 18 A.D. 2d 710 (2d Dept. 1962)]. While it is obviously impossible literally to now live up to the promise not to comment at sentencing made by the prosecutor, the pragmatic-type of approach taken in the cases last cited may be employed here without doing violence to the concept of due process.

That result, we submit, may be achieved by viewing Justice Gellinoff's colloquy with the defense attorney at the pertinent time as the functional equivalent of the type hearing now being requested by Santobello. Hence, the jurist in question was apprised of the possibility that the prosecution had promised to refrain

from asking that a prison term be imposed upon the defendant. Whereupon, that jurist indicated that such silence would not have influenced him, and that he was imposing the sentence solely on the basis of what was shown by the probation report. Needless to say, if there had been no promise made to the defendant Santobello, he still would have had to take his chances with the sentencing judge respecting the imposition of a prison term. Conversely, even if the prosecutor had remained taciturn, the sentencing justice would have possessed the power to impose the clearly legal sentence that Santobello did actually receive.

In sum, the absence of a claim of innocence or misunderstanding by the defendant Santobello, and Justice Gellinoff's disclaimer of being in any way influenced by the prosecutor's attitude, taken together, constitute a legally sufficient basis for concluding that due process notions did not require a vacatur of the plea.

Nothing in the remaining authorities cited by the defendant militates against what we have thus far said. One of those cases amounts simply to a statement that the record evidence did not conclusively refute the allegations in the *coram nobis* petition which bore on an entirely different subject from that involved in this case [see *People* v. *Randolph*, 25 N.Y. 2d 765 (1969)]. All five of the remaining cases cited by Santobello involved more than a promise of leniency, and they are further distinguishable on the ground that, unlike the facts here, the truth of the factual assertions was unknown to the reviewing court, with the result that hearings had to be mandated [see *People* v. *Bagley*, 23 N.Y. 2d 814 (1969); *People* v. *Granello*, 18 N.Y. 2d 823 (1966); *People* v. *Weldon*, 17 N.Y. 2d 814 (1966); *People* v. *Picciotti*, 4 N.Y. 2d 340 (1958); *People* v. *Forlano*, 19 A.D. 2d 365 (1st Dept. 1963)]. Contrariwise, we are now involved with a single issue, the truth of defendant's underlying postulate having been conceded

by us, and the lower court having for all practical purposes held a hearing upon that issue, leaves open only the propriety of its determination.

Before closing this Point, we wish to make some additional comments. To begin with, the United States Supreme Court in *Brady* v. *United States*, 90 S. Ct. 1463 at 1468 (1970), held that 'Central to the plea [of guilty] and the foundation for entering judgment against the defendant is the defendant's admission in open court that he committed the acts charged. * * *' Defendant now tries to escape the pressing force of this statement by claiming that footnote 8 in the *Brady* case renders the aforementioned principle inapplicable to the instant facts. Defendant's distinction, however, is invalid for at least two reasons. First, the context of the footnote refers to prosecutors who threaten charges not justified by the evidence. No such claim is made here, nor would it find any support in the record. For in fact, Santobello pleaded guilty to a lesser offense than that charged in the indictment. Furthermore, no claim of coercion was raised by the defendant at any time during these proceedings.

With reference to the implication in defendant's brief (p. 10) that Executive Assistant District Attorney Rotker requested a hearing on the 'promise' issue, we feel constrained to clarify the facts. Mr. Rotker's so-called request (A25) was made in connection with an earlier motion to withdraw the plea wherein the defendant claimed an earlier lack of knowledge that he could move to suppress certain tangible evidence and oral statements. Furthermore, this 'request' was made alternatively in the event that the principal remedy sought by the People, a denial of the motion, was not granted.

At this point we feel obliged to note an interesting aspect of the motion practice engaged in by Santobello. By motion returnable on June 17, 1969, and supported by the defendant's affidavit sworn to April 19, 1969, the

> defense moved to suppress certain tangible and oral evidence. On October 8, 1969, defendant tried to withdraw his previously entered plea of guilty and in his sworn affidavit in support thereof he stated, *inter alia,* 'that before and at the time a plea of guilty was entered [*i.e.* June 16, 1969], deponent did not know that he had the right to move to suppress any evidence secured by the police as aforesaid'.
>
> We feel that defendant's allegation—that he was unaware of his right to move to suppress albeit he had in fact made such a motion less than four months before—raises very serious doubts as to the good faith of his present claim. For it tends to suggest, as we see it, that he has been less than candid with the Court below and has concerned himself solely with efforts to avoid imposition of a prison term as distinguished from attempts to establish his innocence. Perforce, any claim in this case by the defendant must be carefully scrutinized."

By the foregoing recitation of the facts and respondent's argument in the state courts, we have attempted to establish a foundation for our conclusion—that no substantial federal question is presented by the present case.

To begin with, the constitutional prerequisites for accepting a plea of guilty were met here, with the result that the petitioner implicitly concedes that he knowingly and intentionally pleaded guilty at a time when he was represented by counsel [see, *e.g., North Carolina* v. *Alford,* 400 U.S. 25, 91 S. Ct. 160 (1970); *Brady* v. *United States,* 397 U.S. 742, 90 S. Ct. 1463 (1970)]. As petitioner Santobello would have it, however, the fact that a prosecutorial promise to him was broken makes his situation exceptional. But, the voluntariness of a plea must be considered in the light

of all relevant circumstances, and even the failure by the prosecution to honor a sentence promise does not, *per se,* deprive a plea of its voluntary character [*United States* v. *Malcolm,* 432 F. 2d 809, 814 (2d Cir. 1970)]. On this record, Santobello's plea may not properly be viewed as involuntary.

Noteworthy, initially, is the fact that New York State virtually mandates the granting of any application made prior to sentence seeking permission to withdraw a plea of guilty on the grounds of innocence [see *People* v. *McKennion,* 27 N.Y. 2d 671 (1970)]. Here, of course, no such claim has ever been voiced by the petitioner, the gratuitous remarks in his brief notwithstanding. Indeed, there has never been an assertion by the petitioner, himself, to the effect that he had pleaded in reliance upon the relevant representation, the plaint along those lines having at all times herein been voiced in the argumentation of his various attorneys.

Moreover, since the petitioner was represented by counsel at all times now pertinent, he was chargeable with knowledge that taciturnity on the prosecution's part was not an ironclad guarantee that he would escape the imposition of a prison sentence. Beyond that, he had to have known, as a practical matter, that his prior criminal record greatly enhanced the chances of incarceration.

Additionally, the record impels the conclusion that the petitioner was concerned solely with avoiding a jail sentence, as witness the motion practice in which he engaged. Since no judge was privy to the understanding between the petitioner and the prosecution, Santobello presumably

pleaded before a jurist he considered to be lenient, but as it happened that jurist retired before the date of sentencing.

At the sentencing proceeding, however, Justice Gellinoff was apprised of the pertinent understanding—an agreement of which he would have been unaware if it had been honored. In our view, the imparting of that information, however inadvertently, made the defendant whole, for the promise was not of a kind which could have been enforced by judicial action [see, *e.g., People* v. *Hernandez,* 29 A.D. 2d 865 (2d Dept. 1968); *People* v. *Brooks,* 18 A.D. 2d 710 (2d Dept. 1962)]. Given all the circumstances already mentioned, Justice Gellinoff certainly was not required, *sua sponte,* to offer the petitioner an opportunity to withdraw his guilty plea. The possibility that that jurist would not be swayed either by the comments or the silence of the prosecution was a foreseeable risk from the petitioner's perspective, and the fact that his calculations went awry does not entitle Santobello now to attack the voluntariness of his plea.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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April, 1971